



Division of Advertising Practices

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

July 27, 2006

VIA ELECTRONIC FILING

Honorable George A. O'Toole, Jr.
United States District Court
District of Massachusetts
John Joseph Moakley U.S. Courthouse
1 Courthouse Way
Boston, MA 02210

Re: Federal Trade Commission v. Direct Marketing Concepts, Inc., et al.,
Docket No. 04-CV-11136-GAO

Dear Judge O'Toole:

We write in response to the letter submitted on July 19, 2006 by counsel for Defendants Direct Marketing Concepts, Inc., ITV Direct, Inc., Donald W. Barrett and Robert Maihos (hereafter "Defendants"). Specifically, the Commission respectfully responds to the Defendants' assertion that pursuant to Fed. R. Civ. P. 8(f), "the FTC's technical pleading arguments concerning the preclusive effect of the *Barefoot/Trudeau* litigation should be rejected."

As indicated by the text of Fed. R. Civ. P. 8(c), accord and satisfaction and res judicata are distinct affirmative defenses. *Compare also Rust Engineering Co. v. Lawrence Pumps, Inc.*, 401 F. Supp. 328, 333 (D. Mass. 1975) (elements of accord and satisfaction) with *Gonzalez-Pina v. Rodriguez*, 407 F.3d 425, 429 (1st Cir. 2005) (elements of res judicata). Thus, although Defendants' accord and satisfaction argument may have involved the *factual* background of the Barefoot/Trudeau litigation, their assertion of that defense was insufficient to provide the Commission notice that they would later seek to assert the completely different *legal* theory of res judicata. Accordingly, as Defendants did not raise res judicata as an affirmative defense in either their Answer to the Commission's original Complaint or its Amended Complaint, they should be deemed to have waived any res judicata argument.

The Commission also would like to bring to the Court's attention the location in the record of the text of the infomercial that was the subject of the Barefoot/Trudeau litigation.¹ The

¹ Counsel for the Commission noted during oral argument that Defendants had submitted the transcript of this infomercial in conjunction with their opposition to the Commission's summary judgment motion. Counsel was not sure, however, of the specific document to which the transcript had been attached.

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transcript of that infomercial is attached as Exhibit 23 to the Declaration of Christopher Robertson that was submitted in conjunction with Defendants' opposition to the Commission's summary judgment motion (Docket No. 147). The text of that infomercial, as noted by Commission counsel during argument on July 6, establishes that, even if the Court were to allow Defendants to assert their res judicata defense, the Barefoot/Trudeau litigation involved a completely different infomercial—and thus different operative facts—than the instant litigation between the Commission and Defendants.

Sincerely,

A handwritten signature in dark ink, appearing to read 'E. Glennon', with a long horizontal flourish extending to the right.

Edward Glennon

cc: Peter S. Brooks, Esq.
Christopher F. Robertson, Esq.
Joseph Ryan, Esq.